University of Baltimore Law Forum

Volume 10
Number 1 *Fall 1979*

Article 10

1979

Supreme Court Decisions: Right To Counsel May Be Implicitly Waived

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In a further attempt to convince the Court that he maintained a reasonable expectation of privacy, Smith argued that the phone company ordinarily does not record local calls. He contended that since he was making a local call to McDonough, his expectation of privacy, as to her number, was "legitimate." The majority discarded that contention, noting that whether a call is local or long distance is not the basis for a constitutional distinction. Regardless of what numbers the phone company ordinarily records, the risk was assumed that numerical information would be divulged to the police.

The Court concluded that Smith had no reasonable expectation of privacy in the numbers he dialed, and that, even if he did, his expectation was not "legitimate." Because the petitioner failed to meet the test mandated by *Katz,* the Court held that the use of a pen register was not a "search." It further held that since there was no "search" the failure of the police to obtain a warrant did not constitute reversible error and that the Court of Appeals of Maryland had properly affirmed the ruling of the Criminal Court of Baltimore City in its holding that pen register evidence should not be suppressed.

Justice Stewart, with whom Justice Brennan joined, filed a dissenting opinion. Although he also found *Katz* to be controlling, Justice Stewart was of the opinion that a telephone subscriber has a legitimate expectation of privacy in the numbers he dials. He reasoned that the information obtained by a pen register emanates from private conduct within a person's home or office—places that are entitled to Fourth Amendment protection—and that the numbers dialed are *not* without "content."

Justice Marshall, with whom Justice Brennan joined, also filed a dissenting opinion. Justice Marshall noted that telephone users may not know that the phone company records calls for internal reasons, and therefore users do not expect that the numbers they dial will be made available to the government.

Individuals may reveal certain information to third parties for a limited business purpose without expecting that the information will be released to others for other purposes. Justice Marshall also rejected the majority's rationale that petitioner "assumed the risk" that the numbers he dialed would be revealed to the police. He felt that this argument was misplaced because implicit in the concept of assumption of risk is the notion of free choice. Since the telephone has become a personal and business necessity, individuals have no realistic alternative. Agreeing with the dissenting opinions filed in the Court of Appeals of Maryland, Justice Marshall concluded that the use of pen registers is an extensive intrusion, and that evidence obtained as a result of their use should be suppressed unless the police secure a prior warrant.

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Right To Counsel May Be Implicitly Waived

by Mark D. Woodard

In *North Carolina v. Butler,* ___ U.S. ___, 99 S. Ct. 1755 (1979), the Supreme Court ruled that a criminal defendant under custodial interrogation need not waive his right to a lawyer orally or in writing: a waiver can be inferred from the facts and circumstances of each case. By so holding, the Supreme Court continues to narrow the scope of the so-called "Warren" court's emphasis on the rights of the accused.

Shortly after Butler's arrest, FBI agents took him to their office for questioning. Martinez testified to the following: after determining (method not stated) that Butler had an 11th grade education and was literate, he was given the Bureau's "Advice of Rights" form which he read and stated he understood. However, he refused to sign the form. At trial, Butler stated he was told that although he was not required to speak or sign the form, he was "requested" to answer questions. The defendant replied, "I will talk to you but I am not signing any form." *Id. at 1756.* He then proceeded to make inculpatory statements. FBI agent Martinez stated that Butler said nothing when advised of his right to a lawyer and at no time asked for one.

At the conclusion of the agent's testimony, the defense moved to suppress the evidence of Butler's incriminating statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made.

The trial court denied the motion reasoning that Butler effectively waived his rights, including the right to have an attorney present, by his willingness to answer questions after reading the "Advice of Rights" form. The defendant's incriminating statements were admitted into evidence and the jury convicted him of all charges (kidnapping, armed robbery and felonious assault).

The North Carolina Supreme Court reversed the conviction and remanded for a new trial, holding that the trial court erred in admitting the defendant's inculpatory statements. *North Carolina v. Butler,* 295 N.C. 250, 244 S.E.2d 410 (1978). In its view, the defendant never waived (in writing or orally) his right to an attorney during custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966). The court interpreted *Miranda* as "providing in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." *244 S.E.2d at 413.* See also, *State v. Blackman,* 280 N.C. 42, 49-50, 185 S.E.2d 123, 127-128; *State v. Thackes,* 251 N.C. 447, 453-454, 189 S.E.2d 145, 149-150 (1972). The defendant must expressly waive his

Sixth Amendment right to an attorney during custodial interrogation according to North Carolina's interpretation of *Miranda*.

The United States Supreme Court disagreed. It held that a defendant can also waive his *Miranda* rights during custodial interrogation by his words and actions.

Justice Stewart, writing for the majority, began the opinion by quoting from *Miranda:*

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *384 U.S. at 475.*

The majority concluded that the *Miranda* decision mandated ". . . that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court (in *Miranda*) did not hold that such an express statement is indispensable to a finding of waiver." *99 S. Ct. at 1757.*

The express written or oral waiver is often likely to indicate the validity of the waiver, but it is not "inevitably either necessary or sufficient to establish waiver." *Id.* The Court argues that the question is not one of form, but, rather, whether the defendant knowingly and voluntarily waived his rights. Even though courts must presume that a defendant did not waive his *Miranda* rights, in "at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*

Justice Stewart reasoned that the *per se* rule, i.e., a lack of an express statement makes a waiver *per se* invalid, does not address itself to the uniqueness of each interrogation. Rather, the opinion concluded, the question of waiver of any constitutional right must take into account "the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." *Id. at 1758, citing Johnson v. Zerbst,* 304 U.S. 458, 464 (1937).

Other courts who have considered the question, have also opted for this flexible standard. In fact, ten of the eleven circuits as well as the courts of seventeen states "have held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to counsel guaranteed by the *Miranda* case." *99 S. Ct. at 1759.*

Justice Brennan wrote the dissent in which Justices Marshall and Stevens joined. The dissenting opinion emphasized the interpretation of *Miranda* that no effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the defendant has been informed of his rights. The minority cites *Carnley v. Cochran,* 369 U.S. 506 (1962) "that in the absence of an allegation of an affirmative waiver . . . there is no disputed fact question requiring a hearing." *Id. at 516.*

They note that the majority's holding allows the individual court to infer a waiver based upon the actions and words of the person interrogated. They insist the majority ignored the basic premise of *Miranda* which requires that an ambiguity be interpreted against the interrogator. This premise is based on the recognition that there is "compulsion inherent in custodial interrogation, with its purpose to subjugate the individual to the will of the examiner. Under such conditions, only the most explicit waiver of rights can be considered knowingly and freely given." *99 S. Ct. at 1760.*

The dissent found this case presented a clear example of the need for an express waiver requirement. The majority assumed that Butler understood the written copy of rights given him by the FBI. However, the minority contends (1) "there was a dispute over whether the defendant could read." If he couldn't read there was clearly no waiver; and (2) even if he could read "there is no reason to believe that his oral statements which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights." *Id.*

The dissent expressed its concern that courts faced with actions and words of uncertain meaning will come to quite different conclusions on similar facts. Requiring a defendant to explicitly waive his rights would act as a clarification to prevent future appeals over what actions and what circumstances constitute a waiver.

Conclusion

The "Warren" court's pro-defendant criminal procedure philosophy is at odds with that of the "Burger" court and so the Justices will continue to narrow and limit the *Miranda* decision.

Three justices in the *Miranda* decision remain on the Court today. Justices White and Stewart (with the majority in *Butler*) dissented in *Miranda*. Justice Brennan (with the dissent in *Butler*) was a member of the majority in *Miranda*. If *Butler* had been decided by the "Warren" Court, it would most probably have affirmed the North Carolina decision and found no waiver.

Perhaps those who received the "Warren" court's decisions with dismay because of that court's noticeable preference for an accused's rights will not rejoice in *Butler* quite so heartily when they realize the probable effects of the decision. Now, an already burdened judicial system must ascertain in myriad factual situations, whether, under the totality of circumstances, the defendant waived his Constitutional rights.

Miranda mandates some kind of waiver. An express waiver requirement would just make that requirement explicit. In Justice Brennan's words: "Had agent Martinez simply elicited a clear answer from Willie Butler to the question, 'Do you waive your right to a lawyer?,' this journey through three courts would not have been necessary." *Id.*